STATE OF MICHIGAN

COURT OF APPEALS

MARILYN LAURENDINE, Plaintiff-Appellant,	UNPUBLISHED March 21, 2006
v	No. 257775 Wayne Circuit Court
CCA ASSOCIATES LIMITED PARTNERSHIP, d/b/a CANTON COMMONS APARTMENTS, Defendant-Appellee.	LC No. 03-321285-NO

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this premises liability case, plaintiff, Marilyn Laurendine, appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

This case arises from an incident where plaintiff slipped and fell on an icy sidewalk while walking from her apartment to the parking lot and suffered injury. At approximately 5:00 or 5:15 a.m., on April 8, 2003, plaintiff walked out of the front door of her townhouse to meet her boss, who was going to drive her to work. After she exited her home, she slipped and fell as she stepped onto the ice-covered sidewalk from her porch step. The porch has one step and connects plaintiff's front entrance door with the sidewalk. Plaintiff did not see the ice on the sidewalk until she slipped and fell on it. Plaintiff testified, "I went down on my bottom and my ankle went under me." Plaintiff broke her ankle due to the fall.

Plaintiff had watched a news broadcast the night before her incident and was informed about the likelihood of freezing rain occurring that night; however, she testified that, when she left her apartment in the morning, the weather was dry and she did not notice the ice. Plaintiff has lived in Michigan her entire life and has experienced the unpredictability of Michigan weather, as well as snow and ice covered sidewalks and roadways prior to the incident.

Plaintiff lived at defendant's apartments for two to three years prior to the incident. Plaintiff had never salted her front porch because defendant had always done so. She never had a problem with defendant's failure to salt before the incident. The day before plaintiff's fall, April 7, 2003, defendant used 125 bags of salt to de-ice the sidewalks.

Plaintiff brought suit and defendant filed a motion for summary disposition. The trial court granted defendant's motion for summary disposition, ruling that the condition was open and obvious and stated, "I take no position on whether or not defendant breached the duty and I find that the motion must be granted, because to plaintiff, the condition was open and obvious." Defendant now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the grant of a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham Country Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

III. OPEN AND OBVIOUS

On appeal, plaintiff argues that the trial court improperly granted summary disposition in favor of defendant when it held that the danger presented by the icy sidewalk was open and obvious as a matter of law. We disagree.

In order for a plaintiff to establish a negligence claim, a plaintiff must show (1) that the defendant owed him a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff was injured, and (4) that the defendant's breach caused the plaintiff's injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). A premises owner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford*, Inc, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty does not extend to dangers that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Lugo, supra* at 517. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

Here, plaintiff primarily relies on *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004); however, *Kenny* has been reversed, for the reasons stated in Judge Griffin's dissent. *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005). In his dissent, Judge Griffin adopted the trial court's reasoning for granting summary disposition. *Kenny, supra* at 119 (dissenting opinion). The trial court, in *Kenny*, noted the fact that the plaintiff had been a long time Michigan resident; therefore, she should have been aware of the possible danger that awaited her outside the vehicle after witnessing a snow storm. *Kenny, supra* at 119 (dissenting opinion). Similarly, plaintiff was a long time Michigan resident. The night before the incident, plaintiff heard, on the news, that there was a possibility of freezing rain occurring. It is reasonable to expect that an average person with ordinary intelligence would

have anticipated that the sidewalk would be slippery between 5:00 a.m. and 5:15 a.m. the morning after a night of freezing rain fall. An average person of ordinary intelligence would have discovered the slippery walk upon casual inspection. *Joyce, supra* at 238.

IV. SPECIAL ASPECTS

In the alternative, plaintiff argues that even if the icy sidewalk was open and obvious, special aspects existed that made it unreasonably dangerous. We disagree.

Our Supreme Court has held that if an open and obvious condition possesses special aspects, such that it is "effectively unavoidable" or "impose[s] an unreasonably high risk of severe harm," the open and obvious defense will not shield a premises owner from liability for injury caused by the condition. *Lugo, supra* at 517. The *Lugo* Court gave, as an example, a situation where the floor of a commercial building was covered with standing water and there was only one exit, making walking on the floor effectively unavoidable. *Lugo, supra* at 517. Additionally, an unguarded thirty-foot-deep pit in the middle of a parking lot would present an unreasonably high risk of severe harm to the public. *Lugo, supra* at 518.

In determining whether the condition has a special aspect that would allow recovery, despite the condition's open and obvious nature, this Court asks whether a defendant has reason to foresee that those encountering the condition would not take appropriate precautions in dealing with it. *Perkoviq v Delcor Homes*, 466 Mich 11, 17; 643 NW2d 212 (2002). In *Perkoviq*, the plaintiff was hired to paint houses in a residential development and slipped on a frost covered roof while working. *Perkoviq, supra* at 12-13. In holding that no special aspect brought the condition outside of the open and obvious defense, the Court relied on the fact that there was nothing to indicate that the plaintiff would not have taken the appropriate precautions in protecting himself against the open and obvious dangerous condition. *Perkoviq, supra* at 17.

In *Kenny*, Judge Griffin found no special aspects of the snow and ice covered parking lot. *Kenny, supra* at 121-122 (dissenting opinion). Noting that snow and ice are a common occurrence in Michigan, Judge Griffin stated, "Under the *Lugo, supra* at 518-519, definition of 'special aspects,' ice and snow do not present a '*uniquely high* likelihood of harm or severity of harm.'" *Kenny, supra* at 121-122 (dissenting opinion) (emphasis added by *Kenny*), citing *Joyce, supra* at 241-243. Moreover, the condition was avoidable, because the plaintiff could have stayed in her car or taken more care to prevent herself from slipping on the ice. *Kenny, supra* at 122 (dissenting opinion).

Here, the icy sidewalk upon which plaintiff fell did not present a uniquely high severity of harm and was avoidable. *Kenny, supra* at 121-122 (dissenting opinion). Plaintiff could have walked around the sidewalk or could have been more careful in exiting her apartment after hearing the freezing rain prediction on television the night before. Pursuant to the holdings of *Kenny* and *Joyce*, the icy sidewalk presented no special aspects which would prevent application of the open and obvious defense.

V. STATUTORY DUTY

Finally, plaintiff argues that statutorily imposed duties make the open and obvious defense unavailable to defendant in this case. We disagree.

The open and obvious defense does not apply in cases where a defendant owed a plaintiff a statutorily mandated duty. *O'Donnell v Garasic*, 259 Mich App 569, 571; 676 NW2d 213 (2003). The *O'Donnell* Court recognized that when a defendant breaches a specific statutory duty that is imposed upon him, application of the open and obvious doctrine may be preempted. *O'Donnel, supra* at 571. A plaintiff must demonstrate that the defendant breached the specific statutorily mandated duty in order to survive the grant of summary disposition in favor of a defendant. *O'Donnel, supra* at 582.

Here, plaintiff failed to establish a genuine issue of material fact regarding whether defendant breached a statutorily mandated duty. First, plaintiff asserts that, as a landlord, defendant breached duties mandated by MCL 554.139;[1] therefore, the open and obvious defense is unavailable to defendant. This Court recently noted, "The plain meaning of 'reasonable repair' as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises." *Teufel v Watkins*, 267 Mich App 425, 429 n 1; __ NW2d __ (2005). Thus, MCL 554.139(1)(b) does not impose a statutory duty to remove snow or ice and does not prevent defendant from availing itself of the open and obvious defense.

Second, plaintiff alleges that defendant violated MCL 125.536.[2] MCL 125.536 regulates a landlord's actions in relation to "dwellings," and "common areas" within "dwellings" located on its premises. Statutes must be interpreted under the rule of ordinary usage and common sense. *Adams v Linderman*, 244 Mich App 178, 184; 624 NW2d 776 (2000). A "dwelling" is defined as "a building or other place to live in; place of residence; abode." *Random House Webster's College Dictionary* (2001). The sidewalk where plaintiff slipped was not in a "portion of [her] dwelling." Even though it is arguably a "common area" of the apartment complex, it was not a "common area" of the "dwelling." The ordinary usage of the term "dwelling" does not include a sidewalk because a dwelling is, by definition, a building. Therefore, the statute is not

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[1] MCL 554.139(1)(b) requires landlords:

> [t]o keep the premises in reasonable repair during the term of the lease or license and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

[2] MCL 125.536(1) states:

> When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, where such condition exists in violation of this act, any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition. When the condition is a continuing interference with the use and occupation of the premises, the occupant shall also have injunctive and other relief appropriate to the abatement of the condition.

applicable to the maintenance of sidewalks on a premise, and cannot be used to prevent application of the open and obvious defense.

Finally, plaintiff asserts that defendant breached Canton Township Ordinance No. 145.[3] The undisputed evidence shows that defendant de-iced the sidewalks on April 7, 2003, and again on April 8, 2003, by applying several hundred bags of salt to the walkways. Canton Township Ordinance No. 145 requires that a premises owner remove the snow or ice within 72 hours of its accumulation, and plaintiff has failed to present any evidence that the ice existed on her sidewalk for a period of more than 72 hours. Therefore, she cannot rely on a breach of Canton Township Ordinance No. 145 to remove her case from being barred by the open and obvious defense.

Further, "an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Cursory treatment constitutes abandonment of the issue on appeal. *Goolsby*, *supra* at 655 n 1. While plaintiff may have asserted that defendant violated statutorily imposed duties, she did not present the trial court with a genuine issue of material fact regarding whether defendant breached duties imposed by MCL 554.139, MCL 125.536, or Canton Township Ordinance No. 145, when it failed to remove ice from her walkway. Thus, summary disposition in favor of defendant was proper because plaintiff failed to allege a genuine issue of material fact regarding the imposition of a statutory duty on defendant.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

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[3] Canton Township Ordinance No. 145 § 62-37, provides:

> [n]o person shall permit ice or an accumulation of snow to remain on any sidewalk adjacent to a lot or parcel occupied by him, or on a sidewalk adjacent to any unoccupied lot or parcel owned by him, for a longer period than 72 hours after the ice or snow has formed or fallen. This does not include sidewalks to the rear of a lot or parcel. [Canton Township Ordinance No. 145, 62-37.]